UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE INSTITUTE OF CETACEAN RESEARCH, et al.,

Plaintiffs,

v.

SEA SHEPHERD CONSERVATION SOCIETY, et al.,

Defendants.

SEA SHEPHERD CONSERVATION SOCIETY,

Counterplaintiff,

v.

THE INSTITUTE OF CETACEAN RESEARCH, et al.,

Counterdefendants.

CASE NO. C11-2043JLR

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

I. INTRODUCTION

This matter comes before the court on Defendant Paul Watson's motion to dismiss (W. Mot. (Dkt. # 183)) and Defendant Sea Shepherd Conservation Society's ("Sea Shepherd") motion to dismiss (SSCS Mot. (Dkt. # 186)). Defendants argue that Plaintiffs' (collectively, "Cetacean") claims are moot and unripe. (*See generally* Watson Mot.; SSCS Mot.) Having considered the submissions of the parties, the balance of the record, and the relevant law, and considering itself fully advised, the court DENIES both motions.

II. BACKGROUND

This is a case about whaling in the Antarctic. In general, the International Whaling Commission has adopted a moratorium on commercial whaling. (ICJ Ruling (Dkt. # 175-1) ¶ 100.) Under Article VIII of the International Convention for the Regulation of Whaling ("Convention"), however, this moratorium does not apply to whale hunting conducted in compliance with a scientific research permit granted by a signatory of the Convention. (*Id.* ¶ 55); *see also* International Convention for the Regulation of Whaling [*hereinafter* Convention] art. VIII, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74. On a yearly basis, Japan has issued permits authorizing lethal research to Plaintiff The Institute of Cetacean Research ("the Institute") under the scientific research program known as "JARPA II." (Fujise Decl. (Dkt. # 189) ¶¶ 4-5.) The other plaintiff, Kyodo Senpaku Kaisha, Ltd. owns the ships that The Institute uses in its research whaling. (*Id.*) Each permit covers one whaling season, which runs during the

austral summer from December of one year to March of the next. (*Id.* ¶ 5.). The Institute is the only entity that receives such permits from Japan. (*Id.* ¶ 4.)

Defendants Sea Shepherd Conservation Society and former Sea Shepherd Executive Director Paul Watson oppose Cetacean's killing of whales. (*See* Watson 1st Decl. (Dkt. # 60) ¶ 16).) To that end, each whaling season Defendants' vessels harass and interfere with Plaintiffs' fleet on the open sea. (*See* Compl. (Dkt. # 1) ¶ 15.) Cetacean alleges that Sea Shepherd's tactics include ramming Cetacean's ships, dragging ropes in the water to disable propellers, and directing smoke bombs, flares, butyric acid-filled containers, and lasers at Cetacean's ships. (*Id.*)

Seeking to abate Defendants' conduct, Cetacean sued for injunctive and declaratory relief under the Alien Tort Statute, 28 U.S.C. § 1350, and state law. (*See generally id*.) Cetacean contends that Sea Shepherd's acts amount to piracy and violate international agreements regulating conduct on the high seas. (*See generally id.*) The district court initially denied Cetacean's request for a preliminary injunction and dismissed its piracy claim. (*See* 3/19/12 Orders (Dkt. ## 95, 96).) On appeal, the Ninth Circuit issued a preliminary injunction pending ruling on the merits. (9th Cir. PI (Dkt. # 118).) This injunction prevents Defendants from "physically attacking any vessel engaged by [Cetacean]" and "from navigating in a manner that is likely to endanger the safe navigation of any such vessel." (*Id*.) On the merits, the Ninth Circuit reinstated Cetacean's piracy claim and ordered that the Ninth Circuit's preliminary injunction "remain in effect until further order of this court." (9th Cir. Op'n (Dkt. # 135).)

In the interim, Plaintiffs brought a motion for contempt in the Ninth Circuit,

arguing that Defendants' actions during the 2012-13 whaling season violated the Ninth Circuit's preliminary injunction. (*See Institute of Cetacean Research v. Sea Shepherd*, No. 12-35266 (9th Cir.) ("9th Cir. Dkt.") # 37.) The Special Master assigned to the motion issued a Report and Recommendation recommending that Defendants not be held guilty of contempt. (*See* 9th Cir. Dkt. # 44, R&R (Dkt. # 314).) The Special Master found that, although the harassment of Plaintiffs' fleet continued during the 2012-13 season, that campaign was directed and controlled by Sea Shepherd Australia, an independent foreign entity with a separate board of directors and independent financial resources, and that Defendants had satisfactorily withdrawn all financial and administrative support from that campaign. (*See generally* R&R.) Oral argument on the parties' objections to the Special Master's Report and Recommendation is scheduled for the end of October, 2014. (Dkt. # 192.)

Meanwhile, in March, 2014, the International Court of Justice ("ICJ") held that the special permits granted by Japan in connection with JARPA II do not fall within the provisions for scientific research programs established by Article VIII of the Convention, and that, as a result, Japan has breached its obligations under the Convention. (ICJ Ruling ¶ 274.). The ICJ ruled that Japan must refrain from granting any further permits in pursuance of the JARPA II program. (*Id.*) The ICJ stated: "It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention." (*Id.* ¶ 246.)

Japan has announced that it will abide by the ICJ's decision. *See* International

Court of Justice, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) [Remarks by the Agent of Japan, Koji Tsuroka], *available at* http://www.mofa.go.jp/ecm/fsh/page2e_000012.html. Japan has cancelled JARPA II, and, as a result, will not issue permits authorizing lethal take for the upcoming 2014-15 whaling season. (*See* Plf's Mem. (Dkt. # 176) at 4-5; 4/16/14 Trans. (Dkt. # 182) at 9.)

Japan's official policy towards future research programs, as set forth in a public statement issued by Japan's Minister for Agriculture, Forestry, and Fisheries, declares Japan's intent to undertake a new scientific research program for the 2015-16 whaling season that complies with the ICJ ruling. (*See* Dkt. # 191-2 at 2 ("Kagawa Aff."), 3-5 ("Policy Stmt.").) To that end, Japan will submit its new Antarctic research program to the Scientific Committee of the International Whaling Commission for review by autumn of 2014. (Policy Stmt. ¶ 2; *see also* Committee Rep. (Dkt. # 188-4) at 5-6 (Scientific Committee's May, 2015, report preparing for review of Japan's proposal).) Meanwhile, Cetacean intends to engage in a sighting survey in the Southern Ocean during the 2014-15 season. (Fujise Decl. ¶ 2). Cetacean submitted a proposal for this survey to the Commission's Scientific Committee earlier this year. (*See* Proposal (Dkt. # 189-1).)

In recognition of the factual and legal overlap between the merits of this action and the contempt proceedings ongoing in the Ninth Circuit, proceedings before the district court are currently stayed. (*See* 4/28/14 Order (Dkt. # 181).) The court, however, granted Defendants permission to bring a motion addressing whether the ICJ's ruling has rendered this case moot and/or unripe. (*Id.*) Defendants' motions are now before the court. (*See* SSCS Mot.; Watson Mot.)

III. ANALYSIS

A. Pending Ninth Circuit Proceedings

This court previously declined to permit Defendants to bring a motion premised on *Kiobel v. Royal Dutch Petroleum Co.*, --- U.S.----, 133 S. Ct. 1659 (2013) because the issue of subject matter jurisdiction is currently pending in the Ninth Circuit contempt proceedings. (*See* 4/28/14 Ord. at 6-7). Cetacean argues that, similarly, the court should refrain from considering this motion because the issue of mootness has also been raised in the contempt proceedings. (*See* Resp. (Dkt. # 187) at 18-19.) This argument misapprehends the substance of the contempt proceedings. In fact, the Ninth Circuit will have no occasion to pass on the overall justiciability of Cetacean's claims. In the contempt proceedings, Defendants have raised mootness with respect to a single narrow issue: Cetacean's request for a coercive, civil sanction in the form of a fine. (*See* 9th Cir. Dkt. # 346 at 3.) Specifically, Defendants argue that the cessation of whaling activities for the upcoming season vitiates the need for a sanction to coerce compliance with the preliminary injunction regulating Defendants' activity on the high seas. *See id.* The question of appropriate remedies regarding alleged violations of the Ninth Circuit's injunction, however, is distinct from the questions raised in this motion: whether Cetacean's claims for injunctive and declaratory relief under the Alien Tort Statute (and, by extension, under certain international norms and treaties) and state law are moot and/or unripe. As such, this situation does not raise the same specter of potentially conflicting judgments as does Defendants' attempts to challenge subject matter

jurisdiction under *Kiobel*. Accordingly, the court will address the merits of Defendants' motion.

B. Mootness

1. Mootness standard

A case is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *see also Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001). "The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to the prevailing party." *City of Erie*, 529 U.S. at 287; *see also S. Or. Barter Fair v. Jackson Cnty., Or.*, 372 F.3d 1128, 1133-34 (9th Cir. 2004). Stated another way, the "central question" is "whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005); *see also Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012).

"The party asserting mootness bears the burden of establishing that there is no effective relief remaining that the court could provide." *S. Oregon Barter Fair*, 372 F.3d at 1133-34; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). "The Supreme Court has emphasized that the doctrine of mootness

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is more flexible than other strands of justiciability doctrine."[1] *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003). The reason for this flexibility is that "by the time mootness is an issue, the case has been brought and litigated, often . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth*, 528 U.S. at 190.

When, as here, changed circumstances call into question a plaintiff's ability to continue the activity for which it seeks protection, courts evaluate (1) the plaintiff's stated intentions and, (2) whether "insurmountable barriers" prevent the plaintiff from resuming the activity. *See* Clark, 259 F.3d at 1011-12. For instance, in *Clark*, the defendant argued that a challenge to an ordinance restricting adult cabarets was moot because the plaintiff's license to operate a cabaret had expired and his business was closed. *See id.* Nonetheless, because plaintiff's "stated intention [was] to return to business," the court held that he "still ha[d] a legally cognizable interest in the outcome of this lawsuit sufficient to allow him to seek injunctive relief." *Id.*; *see also id.* at n.9. The court found that the added step of applying for a new license and paying a license fee "[was] not an insurmountable barrier and thus not enough to moot [his] case." *Id.* at 1012.

Similarly, in *Southern Oregon Barter Fair*, the defendant argued that a challenge to a permit requirement for mass gatherings was moot because the plaintiff Fair had not applied for a permit, or staged any other mass gathering, for eight years. *See* 372 F.3d at

[1] Mr. Watson's reply brief supports his mootness arguments with numerous cases addressing the injury-in-fact prong of standing. (*See* Watson Reply (Dkt. # 197) at 5-7.) Standing and mootness, however, are not interchangeable inquiries. *See Friends of the Earth*, 528 U.S. at 190. Specifically, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.*

1133. The court noted that the case "would be moot if the Fair had entirely ceased to operate, left the business, and no longer sought or intended to seek a license." *Id.* The court, however, found that the Fair had "a sufficient ongoing interest in the outcome of the case to avoid mootness" due to the Fair's "stated intention" to return to business, as well as the "ongoing efforts the Fair ha[d] made to arrange another gathering," which included holding smaller events to raise funds and seeking an alternative venue. *Id.* Although the defendant contended that future enforcement against the Fair was "speculative," the court disagreed, finding that the funding and venue barriers were not "insurmountable." *Id.* (quoting *Clark*, 259 F.3d at 1011-12.) Because the court could not conclude that there was "no reasonable expectation that the state will enforce the [challenged] Act against the Fair again," the case was not moot. *Id.*

In contrast, the Ninth Circuit has found cases to be moot only when the plaintiff proves unable or unwilling to continue engaging in the activity for which it originally sought relief. *See, e.g., Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1130 (9th Cir. 2005) (finding case was moot where, pursuant to the parties' settlement agreement, the plaintiff agreed to discontinue its use of the advertisements in question); *Blair v. Shanahan*, 38 F.3d 1514, 1518-19 (9th Cir. 1994) (finding case moot because plaintiff, a former panhandler, had obtained employment and "no longer wishe[d] to engage in the activity proscribed by the statute that he [was] challenging"); *Blair v. Shanahan*, 38 F.3d 1514, 1519 (9th Cir. 1994) (finding case was moot because plaintiffs did not allege that they planned to hold any future events in contravention of the challenged resolution).

2. Application to Cetacean's claims

Here, Defendants argue that Cetacean's claims are moot because Cetacean will not engage in the activity for which it seeks protection—namely, whale hunting—during the 2014-15 season. Defendants overlook the facts that Cetacean intends to resume whaling during the next season, which starts in December 2015, and that the impediments to Cetacean doing so fall far short of the "insurmountable barriers" required by the Ninth Circuit in similar contexts.[2]

Turning first to the question of stated intentions, the government of Japan has publicly announced that its official policy towards future whale research is to develop a new program for the 2015-15 whaling season that complies with the standards set forth in the ICJ ruling. (*See* Policy Stmt.) Specifically, Japan's Minister for Agriculture, Forestry, and Fishes statement in April, 2014, maintains that "Japan has confirmed its basic policy of pursuing the resumption of commercial whaling, by conducting research

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[2] Defendants effectively seek to confine the mootness inquiry to the 2014-15 season, arguing that while Plaintiffs' claims for the 2014-15 season are moot due to the lack of lethal takes, Plaintiffs' claims with respect to future seasons are simultaneously unripe. (*See* Watson Mot. at 5; SSCS Mot. at 5-8.) In response, Cetacean argues that its claims for the 2014-15 season are not moot because Defendants may harass the sighting survey vessels that Cetacean plans to deploy. (*See* Resp. at 12; Fujise Decl. ¶ 3). In reply, Plaintiffs supply for the first time declarations averring that they do not oppose nonlethal research. (*See* Watson Decl. (Dkt. # 199) ¶ 3; West Decl. (Dkt. # 200-1) ¶ 8.) New evidence, however, may not be raised in reply briefs, and courts have discretion to strike any new material that is raised. *See, e.g.*, *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 (9th Cir. 1993) (striking portions of a reply brief that presented new information); *Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir. 1996).

Although Defendants attempt to apply the mootness inquiry only to the 2014-15 season, the court is not required to operate within such an artificial constraint. *See Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) (finding that plaintiffs' intent to continue the protected activity in question in the future was relevant to mootness and "cannot be read to constitute a separate, unripe claim"). Because the court is able to decide mootness based on Cetacean's likely ability to resume whaling in subsequent seasons, the court finds it unnecessary to address stand-alone arguments regarding the 2014-15 season at this time. For the same reason, the court declines to decide whether to strike the new evidence raised in Defendants' reply briefs.

whaling . . .” and that “Japan will further . . . an earnest review of the designs of the whale research programs in the Antarctic . . . with the aim of submitting new research programs to the Scientific Committee of the International Whaling Commission (IWC) by the autumn this year, which reflects the criteria mentioned in the judgment.” *Id.* Moreover, the Deputy Director-General of the Fisheries Agency of Japan testifies that, as explained in the official policy statement, Japan is committed to “conducting research whaling (which includes lethal take and other research methods)” from the year 2015 on. (Kagawa Aff. ¶¶ 2, 3.)

Japan has issued all prior permits for research whaling, both under JARPA II and earlier programs, to The Institute of Cetacean Research. (Fujise Decl. ¶ 4.). No other entity besides The Institute has obtained a permit from Japan. (*Id.*) The Director General of The Institute testifies that, in accordance with Japan’s official policy statement, the Institute intends to ask the government of Japan to issue permits to engage in both lethal and nonlethal research whaling for the 2015 and future seasons. (*Id.*) In the meantime, The Institute will continue its research by engaging in a sighting survey in the Southern Ocean. (Fujise Decl. ¶ 2; Proposal.)

In *San Lazaro Association*, the Ninth Circuit held that although the plaintiff had been disqualified from participating in the Medi-Cal program that formed the basis of the suit for five years, the case was not moot because “on the record before [the court], there is no basis for concluding that [the plaintiff] will not seek to participate in the Medi-Cal program at the end of the five-year period.” *San Lazaro Ass’n, Inc. v. Connell*, 286 F.3d 1088, 1096 (9th Cir. 2002). Here, there is every indication that Cetacean will seek to

participate in the next year's whaling season, and no basis in the record for concluding that it will not. As such, as required by *Clark* and *Southern Oregon Barter Fair*, Cetacean's "stated intentions" are to return to the whaling in the near future, and "ongoing efforts" are directed to meeting that goal. *See Clark*, 259 F.3d at 1011-12; *S. Or. Barter Fair*, 372 F.3d at 1133.

Turning next to question of barriers to Cetacean's resumed whaling, Defendants identify at least three potential barriers: (1) the Convention's requirement that the International Whaling Commission's Scientific Committee review new Article VIII research permits, (2) Japan's need to address the concerns identified in the ICJ ruling, and (3) international pressure against lethal research. None of these barriers is insurmountable.

First, contrary to Defendants' assertions, the Scientific Committee does not approve (or disapprove) Article VIII scientific research permits. The Convention merely requires contracting governments to make proposed permits available to the Commission's Scientific Committee for review and comment prior to issuance. (ICJ Ruling ¶ 47.) The Scientific Committee, however, is not empowered to make any binding assessment regarding research programs. (*Id.*) Rather, the Scientific Committee communicates its views to the Commission in the form of reports or recommendations. (*Id.*) Although the Commission is, in general, empowered to make recommendations to signatory nations, these resolutions are also not binding. (*Id.* (quoting Convention art. VI).) Indeed, the text of Article VIII does not require a contracting government to receive permission from the Commission before issuing a scientific research permit. *See*

Convention, art. viii, ¶ 1. Therefore, it appears that the barriers that Cetacean faces due to the required Scientific Committee review are temporal, not substantive.

Annex P to the Convention sets forth the process by which the Scientific Committee reviews special permit proposals. (*See* Annex P (Dkt. # 188-5).) Specifically, new proposals are submitted to the Scientific Committee at least six months prior to the Annual Scientific Committee Meeting; a specialist workshop prepares a report on the proposal; the Committee discusses the report at the Annual Meeting; and a revised report is submitted to the International Whaling Commission and becomes public in accordance with the Commission's rules. (*Id.* at 3-4.)

Here, the Report of the Scientific Committee issued in May, 2014, confirms that Japan has requested that a special permit for its new Antarctic research program for the 2015-16 season be reviewed at the Scientific Committee's 2015 Annual Meeting, that Japan will submit the new proposal to the Scientific Committee in October or November of 2014, and that Japan is prepared to cover the necessary costs for convening the requisite workshop in Tokyo in January or February of 2015. (Committee Rep. at 5-6.) The official policy statement by Japan's Minister for Agriculture, Forestry, and Fishes agrees that Japan aims to submit its new Antarctic research program to the Scientific Committee in autumn of this year. (*See* Policy Stmt.)

Consequently, at this stage, it appears that the government of Japan is well on its way to timely complying with Annex P and obtaining the requisite Scientific Committee review for the 2015-16 season. Defendants have put forth no evidence showing

otherwise. As such, any barriers to obtaining a permit that Cetacean faces due to the Scientific Committee review appear to be minimal.

Second, Defendants' assertion that Japan will be unable to design a lethal take research program that ameliorates the deficiencies identified in the ICJ Ruling is overstated. The ICJ Ruling acknowledged that Japan would likely implement future research permits and did not impose additional restrictions on such permits beyond those already contained in Article VIII. (ICJ Ruling ¶ 246.) The ICJ also recognized that "Article VIII expressly contemplates the use of lethal methods . . . ." (*Id.* ¶ 83.) Accordingly, the ICJ found that "the fact that a programme uses lethal methods despite the availability of nonlethal alternatives does not mean that a special permit granted for such a programme necessarily falls outside Article VIII." (*Id.* ¶ 137.) Moreover, because the parties agreed that nonlethal methods were not a feasible means to examine some types of data collected in JARPA II, the ICJ found that there was "no basis to conclude that the use of lethal methods is per se unreasonable in the context of JARPA II." (*Id.* ¶¶ 133, 135.) Therefore, going forward, the use of lethal take is not necessarily foreclosed.

Beyond that, Defendants have put forth no evidence—and made no substantive argument—showing that Japan will be unable to address the ICJ's concerns regarding JARPA II, which include concerns over the program's discrepancy between target and actual sample sizes, open-ended nature, extensive target sample sizes, lack of consideration of nonlethal methods, lack of scientific output, and lack of collaboration with other researchers. (*Id.* ¶¶ 224-27). To the contrary, Japan believes it can fashion a

program that complies with the ICJ's concerns. (*See* Policy Stmt.; Kagawa Aff. ¶¶ 2, 3). Nor have Defendants shown that addressing the ICJ concerns will necessarily satisfy their own objections to Japan's research operations.[3] Additionally, the court notes that, because the Commission does not possess veto power over signatories' issuance of scientific permits, it appears that whether Japan's new program passes muster under the ICJ's standards could be established only by a second round of litigation. But it goes without saying that any later-identified deficiencies would not preclude issuance of the permit in the first place. On this record, the court cannot conclude that the ICJ Ruling constitutes an insurmountable barrier to Cetacean's continued whaling. *See Clark*, 259 F.3d at 1011-12; *S. Or. Barter Fair*, 372 F.3d at 1133.

Third, Defendants' contention that "international pressure" will convince Japan to abandon its research program is unsupported. Although international anti-whaling sentiment is well-documented (*see, e.g.*, PI Order (Dkt. # 95) at 3), Defendants' assertions as to the effect of that pressure on the government of Japan are speculative.

In sum, Defendants have not carried their burden to show that Cetacean lacks a legally cognizable interest in the outcome of this suit. *See S. Or. Barter Fair*, 372 F.3d at 1133-34; *City of Erie*, 529 U.S. at 287. Cetacean's stated intention is to resume whaling next season, and Defendants have not established any insurmountable barriers that stand in Cetacean's way. *See Clark*, 259 F.3d at 1011-12. All indications are that the delay in

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[3] For example, the catch limit for minke whales under JARPA II was 850 whales. (ICJ Ruling ¶ 231). Crediting Defendants' strenuous objections to all killing of whales, it seems unlikely that Defendants would find even a substantially lower catch limit unobjectionable. (*See, e.g.*, West Decl. ¶ 8 ("[Sea Shepherd] continues to oppose the killing of whales as a matter of principle.")

lethal whaling caused by the ICJ ruling is only temporary. Because there is a reasonable expectation that Defendants will again engage in the challenged conduct against Cetacean, it remains possible for the court to grant effectual relief to Cetacean, either in the form of an injunction or declaratory judgment. *See City of Erie*, 529 U.S. at 287; *S. Oregon Barter Fair*, 372 F.3d at 1134.

Additionally, the federal court system, at both the trial and appellate level, has already invested over two years of effort in adjudicating this controversy, the end result of which is a hard-won preliminary injunction in favor of Cetacean and an appreciable degree of fact-finding relevant to the merits. (*See, e.g.*, JSR (Dkt. # 173) at 7-8 (agreeing that discovery conducted during the contempt proceedings will reduce discovery necessary at the district court level).) Abandoning the case now only to revisit the issues in the fall of 2015 with a clean slate would prove more wasteful than frugal. *See Friends of the Earth*, 528 U.S. at 190. Accordingly, the court finds that Cetacean's claims are not moot.[4]

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[4] Defendants' contentions that Cetacean fails to show Defendants will continue to be involved in future anti-whaling campaigns improperly seeks to shift the burden of showing mootness to Cetacean. (W. Reply at 8; SSCS Reply (Dkt. # 200) at 6); *see Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1174 (9th Cir. 2009) ("The EPA's attempt to reverse this burden is insufficient to show mootness."). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth*, 528 U.S. at 189. "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Id.* (internal punctuation omitted). In accordance with this principle, the standard for "determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* Here, Defendants have not carried their "heavy burden" of showing it is "absolutely clear" that they will no longer interfere with Cetacean's Antarctic whaling—especially because Defendants disengagement from the most recent campaigns was precipitated solely by the Ninth Circuit's

C. Ripeness

As is frequently the case, the court must now investigate the question of ripeness in addition to that of mootness. *See Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir. 2003). Ripeness has two components: constitutional ripeness and prudential ripeness. *In re Coleman*, 560 F.3d 1000, 1004 (9th Cir. 2009). The court addresses each component in turn below.

1. Constitutional Ripeness

"For a suit to be ripe within the meaning of Article III, it must present concrete legal issues, presented in actual cases, not abstractions." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1123 (9th Cir. 2009) (internal punctuation omitted). "The issues presented must be definite and concrete, not hypothetical or abstract." *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009). "Through avoidance of premature adjudication, the ripeness doctrine prevents courts from becoming entangled in abstract disagreements." *Wolfson v. Brammer*, 616 F.3d 1045, 1057 (9th Cir. 2010).

Here, Cetacean challenges specific, well-defined conduct by Defendants that occurs in a particular factual context: namely, Defendants' interference with Cetacean's whaling vessels in the Southern Ocean using tactics including ramming Cetacean's ships, dragging ropes in the water to disable propellers, and directing smoke bombs, flares, butyric acid-filled containers, and lasers at Cetacean's ships. (*See* Compl. ¶ 15.) As such, the legal issues of whether Defendants' actions constitute piracy and violate

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preliminary injunction. (*See* R&R at 9-22 (detailing Defendants' preparations for the 2012-13 campaign prior to the Ninth Circuit's ruling and their subsequent attempts to distance themselves from the campaign so that the campaign could continue free from the Ninth Circuit's preliminary injunction).)

international agreements regulating conduct on the high seas are definite and concrete. The fact that Cetacean will not be able to continue lethal take of whales until next season does not move this dispute into the realm of abstract and hypothetical disagreements that courts should avoid. *See Wolfson*, 616 F.3d at 1057.

This is true for several reasons. First, Cetacean will be undertaking nonlethal research in the form of sighting surveys during the immediate 2014-15 season. (Fujise Decl. ¶ 2.) Cetacean alleges that Defendants have previously attacked at least one vessel employed by Cetacean for nonlethal research. (Compl. ¶ 15.1 ("In February 2007, the M/V ROBERT HUNTER . . . rammed a sighting vessel used by ICR for nonlethal research.")) Cetacean's requested relief is not limited to its vessels engaged in lethal take. (*See, e.g.*, *id.* ¶ 25.1 (requesting injunctive relieve preventing Defendants from "physically attacking any vessel engaged by plaintiffs in the Southern Ocean.")) And Cetacean remains concerned for the welfare of its vessels in the upcoming season. (Fujise Decl. ¶ 3.) As such, Cetaceans' claims are not premature.[5]

Second, even if Cetacean were not undertaking nonlethal research in the upcoming season, its claims predicated on future seasons of whaling are not so hypothetical or abstract as to be unripe. It is true that "[w]here a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy." *In re Coleman*, 560 F.3d at 1005. However, "[t]hat a

[5] In reply, Defendants supply for the first time declarations averring that they are not opposed to nonlethal research and do not intend to interfere with nonlethal research operations. (*See* Watson Decl. ¶ 3; West Decl. ¶ 8.) Leaving aside the fact that new evidence may not be submitted in reply, *Tovar*, 3 F.3d at 1273, Defendants' declarations go to the merits of Cetacean's request for injunctive relief and do not render this action unripe.

contingency is involved is not fatal to ripeness." *Sandell v. F.A.A.*, 923 F.2d 661, 664 (9th Cir. 1990). At times, "common sense indicates that review should be afforded even though the ultimate injury to the complaining party depends on the occurrence of further events." *Id.*

Accordingly, the Ninth Circuit held that a dispute over a loan discharge was ripe even though injury to the plaintiff would occur only upon her completion of her plan payments, because "plan completion [was] a single factual contingency—not a 'series of contingencies' rendering the decision 'impermissibly speculative.'" *In re Coleman*, 560 F.3d at 1005 (quoting *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1273 (9th Cir.1981)). Similarly, a district court held that a challenge to the predator control portion of a program to protect sage grouse was ripe even though any killing of predators would only begin based on test results reached after the program was initiated. *Comm. for Idaho's High Desert v. Collinge*, 148 F. Supp. 2d 1097, 1100 (D. Idaho 2001). The court noted that because two prior surveys had indicated predation was a problem, initiation of predator control was "highly likely," and, as such, was a "'contingent future event' only in a highly technical sense." *Id.*

So, too, here. Rather than a "series of contingencies," the only contingency to Cetacean's continued injury by Defendants' interference is reception of a research permit for lethal take. *See In re Coleman*, 560 F.3d at 1005. As the above discussion regarding mootness shows, such a contingency is highly likely to occur. *See* Section III.B.2. At this stage, the most significant hurdle appears to be Japan's timely submission of the permit to the Commission's Scientific Committee for review. Nothing in the record

shows that Japan will not meet that deadline—indeed, the record suggests otherwise. (*See* Policy Stmt.; Kagawa Aff. ¶¶ 2, 3; Fujise Decl. ¶ 4; ICJ Ruling ¶ 47; Committee Rep. at 5-6.) Moreover, the temporary delay in whaling will not prejudice the court's ability to decide the substantive legal issues: Defendants' maritime conduct over the previous few years will form an adequate factual record for review. *See Sandell*, 923 F.2d at 664. Because the court's legal analysis will be tethered to a specific, existing factual context, Cetacean's claims are not "impermissibly speculative." *See In re Coleman*, 560 F.3d at 1005. The case is constitutionally ripe.

2. Prudential Ripeness

The Supreme Court recently called into question the continued viability of the prudential ripeness doctrine. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (U.S. 2014) ("To the extent respondents would have us deem petitioners' claims nonjusticiable on grounds that are 'prudential,' rather than constitutional, that request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.") (internal punctuation omitted) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ----, 134 S.Ct. 1377, 1386 (2014)). Nonetheless, absent more definitive guidance from the Supreme Court, and out of an abundance of caution, the court addresses prudential ripeness here.

The question of prudential ripeness requires a court "to first consider the fitness of the issues for judicial review, followed by the hardship to the parties of withholding court consideration." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829,

837 (9th Cir. 2012). Unlike Article III ripeness, which is jurisdictional, prudential considerations of ripeness are discretionary. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc).

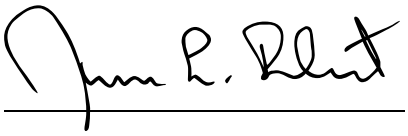
Turning to the first prong, "the purpose of the 'fitness' test . . . is to delay consideration of the issue until the pertinent facts have been well-developed in cases where further factual development would aid the court's consideration." *In re Coleman*, 560 F.3d at 1009. Here, as discussed in the preceding section, further factual development would not aid the court's consideration of the legal issues presented in this case. *See* Section III.C.1. The pertinent facts—Defendants' and Plaintiffs' altercations in the Southern Ocean—while hotly disputed, are well-developed, and, indeed, the Special Master appointed by the Ninth Circuit has already engaged in some relevant fact-finding. (*See* JSR at 7-8.). Because this is not an abstract disagreement but rather involves the application of well-defined law to an existing case and controversy, Plaintiffs' claims are fit for adjudication. *See Oklevueha Native Am. Church*, 676 F.3d at 838.

"As Plaintiffs' claims are fit for review now, we do not reach the second factor of the prudential ripeness inquiry—hardship to the parties in delaying review." *Id.* "Hardship serves as a counterbalance to any interest the judiciary has in delaying consideration of a case." *Id.* Because the court "can identify no interest in delaying review of Plaintiffs' claims, the hardship that would be imposed by any delay is not relevant." *Id.* Accordingly, the court finds that Plaintiffs' claims should not be dismissed on prudential ripeness grounds.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Paul Watson's motion to dismiss (Dkt. # 183) and Sea Shepherd's motion to dismiss (Dkt. # 186).

Dated this 21st day of July, 2014.



JAMES L. ROBART
United States District Judge